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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 TC RICH, LLC, *et al.*,
13 *Plaintiffs,*
14 *v.*
15 PACIFICA CHEMICAL
16 INCORPORATED, *et al.*,
17 *Defendants.*

Case No. 2:15-cv-4878-DMG(AGR_x)

Assigned to Judge Dolly M. Gee

OPPOSITION TO PLAINTIFFS'
MOTION FOR (1) MODIFICATION
OF SCHEDULING ORDER AND (2)
LEAVE TO FILE FIRST AMENDED
COMPLAINT

Hearing Date: April 19, 2019
Time: 9:30 a.m.
Courtroom: 8C

Action filed: June 26, 2015
Discovery cut-off: None set
Trial date: None set

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19
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21 AND RELATED CROSS-ACTIONS
22

23 Defendant Pacifica Chemical Incorporated ("Pacifica") respectfully submits
24 the following opposition to Plaintiffs TC Rich, LLC, Rifle Freight, Inc., Fleischer
25 Customs Brokers, Richard G. Fleischer, and Jacqueline Fleischer's (collectively
26 "Plaintiffs") Motion for (1) Modification of the Scheduling Order and (2) Leave to
27 file a First Amended Complaint:

28 ///



1 **I. INTRODUCTION**

2 Even though three years have elapsed since the deadline for seeking leave to
 3 amend the pleadings expired, Plaintiffs argue there is now “good cause” for granting
 4 them leave to amend their Complaint. By way of explanation, Plaintiffs point to a
 5 minor administrative dispute and falsely accuse Pacifica of game-changing
 6 intransigence. But it was Plaintiffs, not Pacifica, who refused to sign the Department
 7 of Toxic Substances Control’s (“DTSC”) Facility Initiated Corrective Action
 8 (“FICA”) Agreement. Regardless, Pacifica has arranged to complete the next critical
 9 stage of work without the FICA Agreement, resolving the issue for now.

10 Pointing to their dubious accusations, Plaintiffs claim they need Resource
 11 Conservation and Recovery Act (“RCRA”) claims to support an application for
 12 injunctive relief. But Plaintiffs already have claims that could be used to apply for
 13 an injunction – nuisance and trespass – and a request for an injunction is already
 14 expressly included in Plaintiffs’ prayer-for-relief. Consequently, a RCRA claim is
 15 unnecessary for that purpose. Unlike nuisance and trespass, however, RCRA
 16 provides for the recovery of attorneys’ fees, revealing the true reason behind
 17 Plaintiffs’ request. It is far too late in these proceedings to allow an amendment to
 18 merely add a claim for attorneys’ fees, which could easily have been included with
 19 their original complaint or amended into their original complaint in compliance with
 20 the deadline. There is nothing about the supposed FICA Agreement dispute that
 21 justifies the addition of a claim for attorneys’ fees.

22 Finally, given that the standard for allowing the amendment of a pleading at
 23 this late stage of the proceedings focuses on the applicant’s diligence, Plaintiffs fail
 24 the test. After the original amendment deadline passed, the parties stipulated to
 25 continue the various pending deadlines twice. In neither case did Plaintiffs speak up
 26 and ask this Court to allow them to revive or otherwise preserve a right to seek a
 27 RCRA claim. Later still, the parties stipulated to stay the case generally, vacating all
 28 the pending trial deadlines. Again, Plaintiffs failed to make any attempt to preserve



1 their desired RCRA claim. Then, in May 2017 and before the FICA Agreement
 2 dispute arose, Plaintiffs sent Pacifica a 90-day notice of endangerment, which is
 3 required before a RCRA claim may be filed. The date of that notice means Plaintiffs
 4 have known for nearly two years that they wanted to file a RCRA claim against
 5 Pacifica, but they failed to seek leave to do so. Moreover, the FICA Agreement issue
 6 has been pending between the parties since July of 2018, but Plaintiffs are just now
 7 seeking leave to amend. Plaintiffs have been anything but diligent.

8 There is no good cause for allowing this dilatory amendment that seeks nothing
 9 but a new claim for attorneys' fees. Adding such a claim at this late stage in the
 10 proceedings will serve only to interfere with the parties' long-standing settlement
 11 negotiations, give rise to a new round of motion practice, and burden the parties with
 12 additional discovery. This Court should deny Plaintiffs' request.

13 **II. FACTUAL SUMMARY**

14 **A. Procedural History**

15 Plaintiffs' Complaint was filed in June 2015. [ECF No. 1.] The Complaint
 16 includes a "Fifth Cause of Action" for continuing private nuisance, [*id* at ¶¶ 55 – 62],
 17 and a "Sixth Cause of Action" for continuing trespass, [*id* at ¶¶ 63 – 70]. Pursuant
 18 to the Fifth and Sixth Causes of Action, Plaintiffs' Complaint expressly prays for
 19 injunctive relief, asking the Court to "compel [Pacifica] to abate and remove the
 20 current continuing trespass and continuing private nuisance caused by the release and
 21 presence of hazardous substances on the Property." [*Id.* at 25:4-6.]

22 After some initial motion practice, the Court set a January 4, 2016 scheduling
 23 conference, which resulted in the March 11, 2016 deadline for seeking leave to
 24 amend the pleadings. [ECF No. 45.] After the March 11 deadline had long come
 25 and gone, in September 2016 the parties submitted a stipulation seeking a
 26 continuance of the trial date and all related deadlines. [ECF No. 65.] In that
 27 stipulation, Plaintiffs did not seek to revive the deadline for amending the pleadings.
 28 The Court granted the continuance but did not mention the deadline for seeking leave



1 to amend the pleadings, presumably because it had already passed. [ECF No. 68.]

2 In January 2017, the case was reassigned to this Court, which vacated the
3 existing trial date and issued a new scheduling order. [ECF Nos. 71, 72, 72-1.] The
4 new schedule was provided in table format, with “N/A” listed in the cell for the
5 deadline to file a motion for leave to amend the pleadings. [ECF No. 72-1.]
6 Presumably, the Court put “N/A” in that box because the relevant deadline had long
7 past and had not been continued with other deadlines. *See* ECF No. 104, n. 1.

8 Shortly thereafter, in March 2017, the parties submitted another stipulated
9 request for a continuance. [ECF No. 84.] Once again, Plaintiffs did not notify the
10 Court that they might want to amend their Complaint, nor did they seek permission
11 to do so. The Court granted the continuance, setting new dates for trial and related,
12 remaining pre-trial deadlines. [ECF No. 85.] The Court’s order says nothing about
13 the deadline for seeking leave to amend the pleadings, presumably because that
14 deadline had long passed.

15 Three months after seeking a second trial-continuance, in July 2017, the parties
16 submitted another stipulation, this time requesting that the case be completely stayed
17 while environmental investigations proceed. [ECF No. 89.] Notably, in the
18 intervening period Plaintiffs sent Pacifica an alleged 90-day “Notice of
19 Endangerment and Intent to File Suit” pursuant to RCRA, claiming that Plaintiffs
20 would file a RCRA claim against Pacifica “*by way of amendment to its pleadings in*
21 *the pending action between the parties in the United States District Court.*” [Decl.
22 of Bret Stone (“Stone Decl.”) at ¶ 13, Ex. C, p. 7 (emphasis added).] The purported
23 notice is dated May 17, 2017. [*Id.*] Thus, even though Plaintiffs were well-aware
24 that they contemplated amending their Complaint, they made no attempt to preserve
25 their RCRA claim by notifying the Court or otherwise seeking relief from the long-
26 passed deadline for requesting such amendments. Instead, they let nearly another
27 two years pass. Plaintiffs first notified this Court of their interest in amending the
28 Complaint in a Joint Status Report filed on February 28, 2019. [ECF No. 103.]



1 **B. Relevant Investigation and Settlement History**

2 As early as June 30, 2017, the parties informed this Court that Pacifica, its
3 consultant, and its insurer had outlined a detailed proposal to fully remediate
4 Plaintiffs' property at no cost to Plaintiffs. (Stip. re: Litig. Stay (ECF No. 89) at 3:17
5 – 4:17.] It was Pacifica's understanding then, [*id* at 4:2-4], and it remains Pacifica's
6 position now, [Stone Decl. at ¶ 2], that such a settlement only works if Plaintiffs take
7 responsibility for completing the cleanup with money already provided to them in
8 settlements with other parties combined with additional funds to be provided by
9 Pacifica's insurer in exchange for a complete release. Pacifica remains dedicated to
10 settling this case accordingly. [*Id.* at ¶¶ 4, 5, 7, 8.]

11 In keeping with this understanding, when the DTSC provided its draft FICA
12 Agreement to Pacifica's counsel in May 2018, Mr. Stone modified it to include
13 Plaintiff TC Rich, as the current owner of the property. [*Id.* at ¶ 4.] Pacifica sent the
14 proposed FICA Agreement to Plaintiffs on July 5, 2018. [Joint Status Report (ECF
15 No. 96) at 2:27 – 3:1.] Despite repeated follow up, Pacifica heard nothing from
16 Plaintiffs regarding the proposed FICA Agreement for months. [*Id.*] Indeed, even
17 by the October 19, 2018 Joint Status Report, Plaintiffs still had raised no objections
18 to the proposed FICA Agreement, leading Pacifica to request that the Court order
19 them to respond. [*Id.* at 3:7-8.] Eventually, TC Rich refused to sign the FICA
20 Agreement. [Stone Decl. at ¶ 6.]

21 Initially, DTSC declined to approve any additional work without a signed
22 FICA Agreement in place. [Stone Decl. at ¶ 6.] By late February, however, Pacifica
23 had convinced DTSC to allow at least a pilot test to go forward without a FICA
24 Agreement. [*Id.* at ¶ 8.] Since then, Pacifica's consultant, Murex, has been working
25 with DTSC to make the necessary arrangements. [*Id.* at ¶¶ 9, 10, 11.] DTSC is now
26 poised to approve the critical pilot test, [*Id.* at ¶ 11], meaning that the FICA
27 Agreement dispute has been resolved for now, [*Id.* at ¶ 12].

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III. ARGUMENT

As the Court notes in its order granting Plaintiffs leave to file the instant motion, [ECF No. 104], the standard for leave to amend at this stage of the proceedings is “good cause.” *See* FRCP 16(b)(4); *Johnson v. Mammoth Recreations*, 975 F.2d 604, 608 (9th Cir. 1992). The *Johnson* court’s discussion of the standard has been cited thousands of times, and is the best statement of the law in this Circuit:

Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s “good cause” standard primarily considers the diligence of the party seeking the amendment. *The district court may modify the pretrial schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.”* Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment); [citations]. Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. [Citations]. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, *the focus of the inquiry is upon the moving party’s reasons for seeking modification.* *See Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). If that party was not diligent, the inquiry should end.

975 F.2d at 608 (emphasis added). To this analysis, First Circuit courts have added the obvious point that, “‘Good cause’ does not typically include a change of heart on a litigation strategy.” *Snyder v. Collura*, 812 F.3d 46, 52 (1st Cir. 2016).

Here, Plaintiffs offer no good cause for their amendment. The purported need for injunctive relief is a ruse. Pacifica is still doing the necessary work, and Plaintiffs’ existing claims already seek injunctive relief. What Plaintiffs really want is a claim that gives them a chance to recover their attorneys’ fees. But there is no reason why such a claim could not have been included in Plaintiffs’ original Complaint. For three years Plaintiffs failed to make any attempt to add or preserve a RCRA claim. Plaintiffs have been anything but diligent here. Leave to amend should be denied.

A. The FICA Agreement dispute is largely resolved and presents no good cause to allow the requested amendment.

The entire basis for Plaintiffs’ motion does not exist. Plaintiffs’ discussion of the administrative dispute that purportedly leads to their motion is neither accurate



1 nor fair. Pacifica did not refuse to sign the FICA Agreement, as Plaintiffs repeatedly
 2 allege. Pacifica was perfectly willing to sign the FICA Agreement, as long as
 3 Plaintiff TC Rich signed it also. This position was consistent with the settlement
 4 structure that had been jointly revealed to the Court as far back as June 30, 2017,
 5 [ECF No. 89], and which Pacifica has understood to be the basis of settlement
 6 negotiations ever since that time.

7 Regardless of who is at fault, however, this minor disagreement over
 8 administrative process has no business before this Court. It simply is not true that
 9 Pacifica is “no longer cooperating” as Plaintiffs allege. [Memo. Of Ps & As in Supp.
 10 Of Mo. (ECF No. 105-1 (“Motion”)) at 7:13-17.] Since the FICA Agreement
 11 impasse arose, Pacifica has simply found a “work around” that will allow the process
 12 to continue to move forward anyway. The necessary pilot test will still be completed,
 13 and there is no reason why a settlement cannot be reached based upon the results, as
 14 has long been contemplated.

15 Essentially, the alleged change in “trajectory,” [Motion at 7:13], that forms the
 16 basis for Plaintiffs’ motion never happened. What did happen certainly does not
 17 supply good cause for the requested amendment. Plaintiffs’ motion should be denied.

18
 19 **B. Plaintiffs’ existing claims already allow them to seek injunctive**
 20 **relief and adding a belated claim for attorney’s fees is not good**
 21 **cause.**

22 Even if the circumstances were as Plaintiffs allege, the amendment they seek
 23 does not help them. Plaintiffs’ motion asserts that they had a “reasonably-held belief
 24 that injunctive relief was not a necessary claim earlier in this action” [Motion
 25 at 5:8-9.] This assertion forms the entire basis for the relief sought. Because they
 26 could not have known that Pacifica would suddenly stop cooperating, Plaintiffs
 27 allege, they could not have known that they would need a claim for injunctive relief.
 28 No other cause for the requested amendment is offered.

It is fair to say that Plaintiffs’ argument lacks a certain amount of candor with



1 the Court. Plaintiffs must have known something about a need for injunctive relief,
 2 because their Complaint already contains two such claims and expressly requests
 3 such relief. Based on their causes of action for nuisance and trespass, Plaintiffs fourth
 4 prayer-for-relief sought at the outset the exact injunction that they now claim they
 5 could not have known was needed until the recent FICA Agreement impasse. Thus,
 6 contrary to their argument, Plaintiffs do not need to add a RCRA claim in order to
 7 request an injunction.

8 If Plaintiffs do not need RCRA to request an injunction, then why did they
 9 make this motion? Plaintiffs answer that question only in passing, perhaps hoping
 10 the Court would not notice while at the same time getting credit for having mentioned
 11 it if it came up – attorneys’ fees. [Motion at 5:3-7.] Currently, although the
 12 Complaint requests their recovery, none of Plaintiffs’ claims provide for the recovery
 13 of attorneys’ fees. RCRA, however, allows for the prevailing party to apply for the
 14 recovery of their “costs of litigation (including reasonable attorney and expert
 15 witness fees).” 42 U.S.C. § 6972(e). This is the real reason behind the current
 16 motion. Nothing in this case has changed that provides good cause for this belated
 17 amendment to seek attorneys’ fees from Pacifica.

18 **C. Plaintiffs have been far from diligent in seeking this amendment.**

19 Most importantly, even if the circumstances justified it and the requested
 20 amendment was appropriate, Plaintiffs still have been nowhere near sufficiently
 21 diligent. The deadline for requesting leave to amend the pleadings expired over three
 22 years ago. In the Ninth Circuit alone, there are thousands of cases that address
 23 belated requests to amend the pleadings, so it is impossible to say that no case has
 24 ever found a three-year delay to be diligent, and Plaintiffs cite no such case. But a
 25 review of the case law on this subject makes clear that courts often reject requested
 26 amendments for a lack of diligence, even when they only miss the deadline by a few
 27 months. *See, e.g., VIA Technologies, Inc. v. ASUS Computer Int’l*, No. 14-cv-03586-
 28 BLF (HRL), 2017 U.S. Dist. LEXIS 12614 at *1-4 (N.D. Cal. Jan. 30, 2017) (motion



1 to amend not diligent when filed three months after a court order provided notice to
2 plaintiff). A three-year delay is, at least, extraordinary.

3 Moreover, during the intervening three years, Plaintiffs passed up multiple
4 opportunities to preserve a right to include a RCRA claim in this lawsuit. Twice, the
5 parties submitted stipulations requesting that the Court continue the trial date and
6 related pre-trial deadlines. Plaintiffs could easily have requested that the Court
7 include a new deadline for amending the pleadings, explaining their interest in adding
8 a cause-of-action under RCRA. The Court may have required a showing of good
9 cause, but a request at those times would have been far more diligent than now.

10 Later, the parties submitted another stipulation, requesting a general stay of the
11 case while environmental investigations proceeded. Again, Plaintiffs said nothing to
12 this Court about amending their Complaint. What makes the lack of diligence so
13 manifest at that time is that it was filed over a month after Plaintiffs sent Pacifica
14 their 90-day “Notice of Endangerment and Intent to File Suit” under RCRA. That
15 notice expressly declares Plaintiffs’ intent to amend their Complaint, even though
16 they knew the deadline for such an amendment had long passed. And still, Plaintiffs
17 filed a scheduling stipulation with this Court, which made no attempt to resurrect a
18 right to amend the pleadings or otherwise preserve a claim under RCRA. Instead,
19 Plaintiffs allowed almost another two years to pass.

20 Plaintiffs lacked diligence even after the dispute over the FICA Agreement
21 arose. Pacifica sent Plaintiffs the modified FICA Agreement on July 5, 2018. [Joint
22 Status Report (ECF No. 96) at 2:27 – 3:1.] Plaintiffs offered no response to the draft
23 FICA Agreement for over three months. After repeated attempts to get a response
24 were ignored, Pacifica finally included a request that this Court order a response in
25 the October 19, 2018 Joint Status Report. [*Id.* at 3:7-8.] Even in the face of that
26 request, Plaintiffs said nothing to this Court about amending their Complaint. Indeed,
27 Plaintiffs still waited another four months, finally requesting leave to make this
28 motion in the February 28, 2019 Joint Status Report.



1 Plaintiffs could hardly have been less diligent in seeking this amendment. This
2 motion must be denied.

3
4 **D. Plaintiffs requested amendment will only interfere with months of
settlement negotiations.**

5 While prejudice to the opposing party is not the focus, *Johnson, supra*, 975
6 F.2d at 608, it bears at least some mention in response to this motion. This case has
7 been pending for almost four years. The parties have conducted discovery, engaged
8 in extensive environmental investigations, and participated in substantial, mediated
9 settlement negotiations. For its part, Pacifica continues to conduct its investigations
10 and work towards settlement in good faith. Adding new claims now, along with
11 likely motion practice and discovery, would be extremely unproductive and
12 prejudicial toward Pacifica. Plaintiffs' motion should be denied.

13 **III. CONCLUSION**

14 Plaintiffs' motion does not come close to demonstrating good cause for
15 allowing a late amendment to their Complaint. The entire justification for the request
16 is non-existent and, even if it did exist, the requested amendment does not address
17 the alleged cause. Plaintiffs already have claims with which they can request
18 injunctive relief, if necessary. Plaintiffs have passed on opportunity after opportunity
19 to make some attempt to preserve their requested RCRA claim but waited almost
20 three years anyway. Plaintiffs should not be allowed to upset so much progress at
21 the last minute. Pacifica respectfully requests that Plaintiffs' motion be denied.

22 DATED: March 29, 2019

PALADIN LAW GROUP® LLP

23
24 */s/ Jon G. Lycett*

25 _____
26 Jon G. Lycett
27 Counsel for Defendant Pacifica Chemical
28 Incorporated

